(2)

Supreme Court, U.S.
FILED
APR 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1442

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN DOE, CROSS-PETITIONER

v.

ROBERT M. GATES,
ACTING DIRECTOR OF CENTRAL INTELLIGENCE

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DAVID P. DOHERTY
General Counsel
Central Intelligence Agency
Washington, D.C. 20505

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

TABLE OF AUTHORITIES

Cases: Page

Bishop v. *Wood*, 426 U.S. 341 (1976) 3-4
Board of Regents v. *Roth*, 408 U.S. 564 (1972) 2
Bollow v. *Federal Reserve Bank*, 650 F.2d 1093 (9th Cir. 1981), cert. denied, 455 U.S. 948 (1982) 7, 8
CIA v. *Sims*, 471 U.S. 159 (1985) 6
Cleveland Board of Education v. *Loudermill*, 470 U.S. 532 (1985) 2, 3
Codd v. *Velger*, 429 U.S. 624 (1977) 3, 4
Cole v. *Young*, 351 U.S. 536 (1956) 6
Dunlop v. *Bachowski*, 421 U.S. 560 (1975) 8, 9
Egan v. *Department of the Navy*, 802 F.2d 1563 (Fed. Cir. 1986), petition for cert. pending, No. 86-1552 11
Gonzalez v. *United States*, 348 U.S. 407 (1955) 9
Haig v. *Agee*, 453 U.S. 280 (1981) 6
Hewitt v. *Helms*, 459 U.S. 460 (1983) 5
Hoska v. *Department of the Army*, 694 F.2d 270 (D.C. Cir. 1982) 8
King v. *Hampton*, 451 F.2d 247 (8th Cir.), aff'g 327 F. Supp. 714 (E.D. Mo. 1971) 8
Normile v. *McFague*, 685 F.2d 9 (1st Cir. 1982) 8
Olsen v. *Department of Commerce*, 735 F.2d 558 (Fed. Cir. 1984) 8
Simmons v. *United States*, 348 U.S. 397 (1955) 9
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 6
Zeisel v. *Pierce*, 784 F.2d 405 (D.C. Cir. 1986) 8

Constitution, statutes, and regulation:

U.S. Const. Amend. V (Due Process Clause) 2, 6
Administrative Procedure Act, 5 U.S.C. (& Supp. III) 551:
5 U.S.C. 551(5) 8
5 U.S.C. 551(7) 8
5 U.S.C. 551(9) 8
5 U.S.C. 551(12) 8
5 U.S.C. 554(a)(2) 8
5 U.S.C. 555(e) 6, 7, 8, 9
5 U.S.C. 701-706 1
5 U.S.C. 701(a)(2) 7

Constitution, statutes, and regulation—Continued: Page

Civil Service Reform Act of 1978, 5 U.S.C. 7501.... 3
Intelligence Authorization Act for Fiscal Year 1987, Pub. L. No. 99-569, § 504, 100 Stat. 3198.... 11
Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 481:
29 U.S.C. 482(a) 9
29 U.S.C. 482(b) 9
National Security Act of 1947, § 102(c), 50 U.S.C. 403(c) 1, 3, 4, 6, 7, 8, 9, 10
Universal Military Training and Service Act § 6(j), 50 U.S.C. App. (Supp. II 1948) 456(j).. 9
5 U.S.C. 7532 ..... 11, 1a-2a
10 U.S.C. (Supp. III) 1604(e)(1) 10
50 U.S.C. 833(a) 10
CIA Headquarters Reg. 20-27 (Mar. 17, 1977):
§ 20-27.j 3, 9
§ 20-27.m 3, 9
§ 20-27.m(8)(C) 3, 9

Miscellaneous:

Senate Comm. on the Judiciary, *Administrative Procedure Act: Legislative History*, S. Doc. 248, 79th Cong., 2d Sess. (1946) 8

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1442

JOHN DOE, CROSS-PETITIONER

v.

ROBERT M. GATES,
ACTING DIRECTOR OF CENTRAL INTELLIGENCE

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In No. 86-1294, we filed a petition for a writ of certiorari presenting the question whether the decision of the Director of Central Intelligence to discharge an officer or employee of the Central Intelligence Agency (here, John Doe) pursuant to the Director's authority under Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), is judicially reviewable under the Administrative Procedure Act, 5 U.S.C. (& Supp. III) 701-706. Respondent John Doe has now filed a cross-petition, claiming that the review afforded him by the court of appeals does not go far enough, because he is entitled to a fuller explanation of the reasons for his dismissal (Cross-Pet. 2). Because the cross-petition neither raises a

significant question of federal law nor demonstrates a conflict with the decisions of this Court or among the circuits, review by this Court is not warranted.

1. Doe maintains that he is entitled under the Due Process Clause, the APA, and the CIA's regulations to a statement of the reasons for his dismissal from the CIA. That claim does not warrant review even if the government's petition is granted. The court of appeals remanded this case to the district court precisely because the record did not reveal the Director's reason(s) for dismissing Doe (Pet. App. 25a, 32a). In these circumstances, it is difficult to see how the relief Doe has sought in his cross-petition differs from the relief he has already been awarded under the judgment below. In any event, he is not entitled to further information concerning the reasons for his dismissal.

a. Relying on *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985), Doe argues (Cross-Pet. 8) that he was entitled to a statement of the reasons for his discharge from the CIA, since it may affect his liberty interest in obtaining future employment. *Loudermill* ruled that a "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" before he may be discharged (470 U.S. at 546). Doe was not a "tenured" CIA employee, however,[1] as the court of appeals correctly deter-

[1] Tenure rights are created by "existing rules or understandings" that stem from a source independent from the Due Process Clause, such as a statute, regulation, or contract (*Loudermill*, 470 U.S. at 546; *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972)). No such authority gave Doe a property right in continued employment with the CIA. The text of

mined,[2] and Doe does not argue to the contrary. Accordingly, Doe's reliance on *Loudermill* is misplaced.

Doe argues that the hearing procedures necessary before a tenured public employee may be discharged also apply when an employee is entitled only to a "name-clearing hearing" (Pet. App. 31a). It is doubtful that Doe has stated a claim that the government has deprived him of a liberty interest by preventing him from obtaining future employment, because his complaint did not allege that the CIA has published any false or defamatory statements in connection with his dismissal, and the failure to do so ordinarily "dooms" a claim like Doe's (*Loudermill*, 470 U.S. at 547 n.13; *Bishop* v. *Wood*, 426 U.S. 341,

---

Section 102(c) denies CIA personnel the qualified tenure rights held by other civil service employees under the Lloyd-LaFollette Act (now the Civil Service Reform Act of 1978, 5 U.S.C. 7501); the Agency's regulations reiterate the terms of the statute (CIA Headquarters Reg. §§ 20-27.j, 20-27.m, 20-27.m(8)(c) (Mar. 17, 1977); and Doe has alleged no other source of a property right. Accordingly, since Doe was not deprived of a property right by his discharge, he had no due process right to examine the Office of Security report or to receive a statement of reasons for his dismissal. *Codd* v. *Velger*, 429 U.S. 624, 628 (1977) (when a public employee has no property interest in continued employment, "the adequacy or even the existence of reasons for failing to rehire him presents no federal constitutional question").

[2] Doe erroneously asserts (Cross-Pet. 6) that the court of appeals never addressed his claim that he had a property interest in continued employment with the CIA. The court ruled that Doe would have no constitutional claim unless the Director dismissed him because of a CIA policy barring the employment of all homosexuals. Pet. App. 23a-28a (discussed at 86-1294 Pet. 7-8). In so ruling, it necessarily rejected Doe's claim that his discharge unlawfully deprived him of a property interest in continued employment with the CIA.

348 (1976)).[3] In any event, "the hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely 'to provide [him] an opportunity to clear his name,'" not to convince his employer that he should be reinstated (*Codd* v. *Velger*, 429 U.S. 624, 627 (1977)). As the court of appeals found (Pet. App. 31a-32a), the procedures afforded Doe gave him "an opportunity to refute the charges and 'clear his name.'" Doe admitted that he was a homosexual; he was given notice that the CIA was concerned that the circumstances of his homosexuality created a security risk;[4] he was given a chance to

---

[3] Doe's complaint alleged that the CIA will give him a positive recommendation to any future employer, but that he was told by a CIA security officer and an assistant general counsel that, if he applies for a job requiring a security clearance, the CIA will inform the prospective employer that the CIA determined that Doe is a security risk because of his homosexuality. Amended Complaint paras. 37-38 (C.A. App. 49-50); see also Plaintiff's Statement of Material Facts As To Which There Is No Genuine Dispute paras. 53-54 (C.A. App. 16-17). The court of appeals predicted that, "[a]s a practical matter, Doe will be unable to obtain employment whenever a security clearance is required," because "we find it inconceivable that other agencies [and private employers] would second-guess such a determination by the CIA" (Pet. App. 30a & n.67). But Section 102(c) in terms provides that dismissal does not by itself bar a former CIA employee from obtaining other employment by the federal government (86-1294 Pet. 24). Given the sensitive nature of the CIA's work, there is also no reason to assume, as the court of appeals did, that private employers will automatically follow the CIA's determination. There is no need to resolve these issues in this case, however, since the court of appeals correctly held that the procedures afforded Doe by the CIA were sufficient.

[4] The letter that Doe's counsel submitted to the Director stated that a CIA security officer had told Doe that the CIA

review and to respond to a factual report summarizing his interviews and his polygraph results; and he took advantage of the opportunity to dispel the CIA's concern that he was a security risk in a letter from his counsel to the Director (*id.* at 4a; C.A. App. 26-30). Doe has cited no decision suggesting that a "name-clearing hearing" requires more.

Doe complains (Cross-Pet. 7) that he deserved a fuller explanation of the facts to learn whether the Director's decision "was based on some misunderstanding of the facts of his case or on an irrational bias toward homosexuals." But Doe was aware of the nature of the Office of Security's general concerns, including "his unwillingness to identify his homosexual partners" (C.A. App. 27). Moreover, in an extensive letter to the Director, Doe's counsel addressed his concerns that the Director might misunderstand the facts of his case or harbor an irrational bias towards homosexuals (*id.* at 26-30). Accordingly, Doe had a meaningful opportunity to clear his name, even though the proceedings were informal. Cf. *Hewitt* v. *Helms*, 459 U.S. 460, 472-474 (1983) (prison officials need only conduct "an informal, nonadversary review" of the information supporting administrative confinement).

Doe concedes (Cross-Pet. 10-11) that there are circumstances where the CIA may properly withhold the reasons for dismissing an employee because of national security concerns, but he maintains that the Director should be required to justify such withholding on a case-by-case basis. The court of appeals

---

was concerned about "the duration and frequency of Mr. Doe's sexual activity, his failure to reveal his homosexuality to the Agency for six years, and his unwillingness to identify his homosexual partners." C.A. App. 27.

correctly noted (Pet. App. 23a-24a), however, that Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), reflects Congress's judgment that the Director must have broad power to remove employees for the slightest security risk, and that even his judgments about whether to withhold information or explain the reasons why he is doing so are entitled to great deference. This judgment by Congress is entitled to deference even on the question whether due process requires disclosure (see *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319-320 (1985)). Congress's judgment is also eminently reasonable. As this Court has recognized, "[i]t is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency," which has "both the capacity to gather and analyze any information that is in the public domain and the substantial expertise in deducing the identities of intelligence sources from seemingly unimportant details." *CIA* v. *Sims*, 471 U.S. 159, 178-179 (1985). These considerations are relevant in determining the process that is due under the Fifth Amendment. See *Haig* v. *Agee*, 453 U.S. 280, 309 (1981); *Cole* v. *Young*, 351 U.S. 536, 546-547 (1956). It was thus hardly unreasonable for the court of appeals to limit the disclosures necessary for a proceeding whose sole purpose is to allow an employee to clear his name.

b. Doe also contends (Cross-Pet. 8-9) that he has a right under 5 U.S.C. 555(e) to a statement of the reasons for his dismissal.[5] More specifically, he

---

[5] Section 555(e) of Title 5 provides:

> Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other re-

claims a right under Section 555(e) to a copy of the CIA Office of Security report to the Director, but having made no such claim in the lower courts he may not do so now. In any event, Doe's argument under Section 555(e) is insubstantial.[6]

---

quest of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

[6] As we have explained in the petition (86-1294 Pet. 12-22), the Director's decision to dismiss a CIA employee under Section 102(c) is not subject to review under the APA. Doe therefore is not entitled under 5 U.S.C. 555(e) to a statement of the reasons why he was discharged. *Bollow* v. *Federal Reserve Bank*, 650 F.2d 1093, 1101-1102 (9th Cir. 1981), cert. denied, 455 U.S. 948 (1982) (the government is not required by 5 U.S.C. 555(e) to provide a statement of reasons for an employee's dismissal when the decision to discharge him is "committed to agency discretion by law" under 5 U.S.C. 701(a)(2)).

But Section 102(c) shows that Doe's claim lacks merit even if the Director's decision to dismiss him may be reviewed under the APA. As we explained in the petition (at 14-15), Section 102(c), which was adopted the year after the enactment of the APA, denies CIA personnel the rights that Doe seeks, because it provides that the Director's authority to remove a CIA employee is exempt from the civil service laws, which would otherwise have guaranteed Doe notice of any charges and a statement of reasons for his removal. It would be anomalous to find that 5 U.S.C. 555(e) guarantees CIA personnel the same rights explicitly withheld from them under a statute that is specifically addressed to the rights of Agency employees, Section 102(c). Accordingly, 5 U.S.C. 555(e) cannot be read to require the Director to provide a statement of reasons why he invoked his authority under Section 102(c) to remove a CIA employee, even if the merits

Section 555(e) applies only to an "agency proceeding," and an "agency proceeding" includes only "rule-making," "adjudication," or "licensing" procedures (5 U.S.C. 551(5), (7), (9), and (12)). While the termination of an employee might conceivably be argued to involve an adjudication, it is clear from the statute that the APA hearing procedures do not apply to disputes regarding the "selection or tenure of an employee." 5 U.S.C. 554(a)(2); Senate Comm. on the Judiciary, *Administrative Procedure Act: Legislative History*, S. Doc. 248, 79th Cong., 2d Sess. 202, 260-261 (1946); *Normile* v. *McFague*, 685 F.2d 9, 10 n.2 (1st Cir. 1982) (5 U.S.C. 555(e) is inapplicable to the dismissal of a federal employee); *Bollow* v. *Federal Reserve Bank*, 650 F.2d 1093, 1101-1102 (9th Cir. 1981), cert. denied, 455 U.S. 948 (1982) (5 U.S.C. 555(e) does not entitle a federal employee to a statement of the reasons for his removal); *King* v. *Hampton*, 451 F.2d 247, 249 (8th Cir.), aff'g 327 F. Supp. 714, 716 (E.D. Mo. 1971); see *Zeisel* v. *Pierce*, 784 F.2d 405, 408 (D.C. Cir. 1986) (dismissal of an employee is a matter involving "tenure" under 5 U.S.C. 554(a)(2)); *Olsen* v. *Department of Commerce*, 735 F.2d 558, 562 (Fed. Cir. 1984) ("[t]he discharge of an employee involves his 'tenure'" under 5 U.S.C. 554(a)(2)); *Hoska* v. *Department of the Army*, 694 F.2d 270, 273 (D.C. Cir. 1982).[7] Accordingly, Doe

---

of the Director's decision can itself be reviewed under the APA.

For the reasons given in the text, however, Doe's claim lacks merit even if our construction of Section 102(c) is erroneous.

[7] None of the cases cited by Doe is to the contrary. *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), on which Doe relies

had no right under 5 U.S.C. 555(e) to a statement of reasons from the Director explaining his actions.

c. Finally, Doe argues (Cross-Pet. 10) that the CIA's regulations entitle him to know why he was dismissed and to examine the Office of Security report, but that claim is frivolous. The pertinent regulation expressly preserves the Director's discretion under Section 102(c) to remove an employee summarily without issuing a statement of reasons. CIA Headquarters Reg. §§ 20-27.j, 20-27.m, 20-27.m(8)(c) (Mar. 17, 1977) (reprinted in relevant part at Pet. App. 19a-20a).[8] As the court of appeals succinctly

---

(Cross-Pet. 8), does not support his claim. *Dunlop* found insufficient the Secretary of Labor's statement of reasons for refusing to file an action to set aside a labor union election, on the ground that the statement did not satisfy the requirements of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 482(a) and (b) (421 U.S. at 573-574). That statute is not at issue in this case, and, in contrast to it, the relevant statute, Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), certainly does not expressly or impliedly require a statement of reasons for an employee's removal.

Doe's reliance (Cross-Pet. 9) on *Simmons* v. *United States*, 348 U.S. 397 (1955), and *Gonzalez* v. *United States*, 348 U.S. 407 (1955), is also misplaced. Neither case involved 5 U.S.C. 555(e). Instead, those cases dealt with the requirements of an entirely different statute, Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. (Supp. II 1948) 456(j), which required a hearing on "'the character and good faith'" of a claim of conscientious objector status (*Simmons*, 348 U.S. at 403 (quoting statute)). In this case, the relevant statute, Section 102(c), does not require the Director to find any facts or to conduct a hearing before an employee may be removed.

[8] Doe argues (Cross-Pet. 10) that the Director's authority is limited by the Agency's regulations to those circumstances

put it (Pet. App. 20a), "[w]e cannot imagine how the CIA could have more plainly expressed its intent to protect the discretion granted it by section 102 (c)."

2. Doe asserts (Cross-Pet. 7) that the court of appeals' decision threatens "thousands of federal employees," who, he contends, may be summarily removed under that decision by "the mere invocation of the phrase 'national security.'" Doe has clearly exaggerated the effect of the court of appeals' decision on federal employees.

The court of appeals emphasized that judicial review is limited because of the broad discretion vested in the Director to remove CIA personnel under Section 102(c) and because the sensitive nature of the CIA's functions and the national security interests at stake dictate that judicial oversight of the Director's removal decisions be particularly circumscribed (Pet. App. 23a-24a). Neither consideration is present for civil service personnel not employed within the intelligence community.[9] In fact, a different stat-

---

where urgency is required. As the court of appeals explained (Pet. App. 20a-21a), however, the CIA's regulations impose no such requirement. In any event, the Director's affidavit indicates that he did "exercis[e] my discretion under the authority granted by section 102(c) * * * and pursuant to HR 20-27m" to discharge an employee "immediately" when the "circumstances of a case * * * make the[] [normal separation] procedures impractical or undesirable" (C.A. App. 45 (quoting regulation)). Doe is incorrect in asserting that the Director did not.

[9] There are other statutes similar to Section 102(c), but they are also limited to employees of other intelligence agencies. 50 U.S.C. 833(a) (National Security Agency); 10 U.S.C. (Supp. III) 1604(e)(1) (Defense Intelligence

ute, 5 U.S.C. 7532, defines the procedures for the separation on national security grounds of such civil service employees, and it provides them with the very procedures that petitioner deems necessary (App., *infra*, 1a-2a).[10] Accordingly, although we believe that the court of appeals' decision will have a serious and damaging effect on the intelligence community, there is no substance to Doe's fear that its ruling will be applied beyond those confines.

Agency); Intelligence Authorization Act for Fiscal Year 1987, Pub. L. No. 99-569, § 504, 100 Stat. 3198 (civilian intelligence employees or officers of a military department); see 86-1294 Pet. 18-19 & nn.16-17 (reprinting statutes). Moreover, under these statutes the Secretary of Defense may summarily discharge an employee only when the Secretary finds that other procedures cannot be followed consistent with the national security.

[10] In *Department of the Navy* v. *Egan*, petition for cert. pending, No. 86-1552, we have sought review of a decision of the Federal Circuit holding that the Merit Systems Protection Board may, in the course of reviewing the removal of an employee for failing to maintain a required security clearance, review the merits of the agency's underlying decision to revoke a security clearance. (We have provided Doe's counsel with a copy of our petition in *Egan*.) The questions in *Egan* and in this case are quite distinct. In *Egan*, we agree that Egan's removal was subject to review to determine, inter alia, whether he received procedural due process; we contest only the MSPB's right to second guess the clearance determination on the merits. 86-1552 Pet. 19-20. Here, our contention is that another statute specifically bars review of either the merits or the procedures leading to removal. The Federal Circuit in *Egan* specifically recognized that the intelligence agencies, such as the CIA, are governed by their own statutes, which exempt them from the procedural rights applicable to civil service employees generally. *Egan* v. *Department of the Navy*, 802 F.2d 1563, 1567 n.2 (1986).

It is therefore respectfully submitted that the cross-petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DAVID P. DOHERTY
General Counsel
Central Intelligence Agency

APRIL 1987

APPENDIX

5 U.S.C. 7532 provides as follows:

> (a) Notwithstanding other statutes, the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security. To the extent that the head of the agency determines that the interests of national security permit, the suspended employee shall be notified of the reasons for the suspension. Within 30 days after the notification, the suspended employee is entitled to submit to the official designated by the head of the agency statements or affidavits to show why he should be restored to duty.
>
> (b) Subject to subsection (c) of this section, the head of an agency may remove an employee suspended under subsection (a) of this section when, after such investigation and review as he considers necessary, he determines that removal is necessary or advisable in the interests of national security. The determination of the head of the agency is final.
>
> (c) An employee suspended under subsection (a) of this section who—
>
> (1) has a permanent or indefinite appointment;
>
> (2) has completed his probationary or trial period; and
>
> (3) is a citizen of the United States;
>
> is entitled, after suspension and before removal, to—

(A) a written statement of the charges against him within 30 days after suspension, which may be amended within 30 days thereafter and which shall be stated as specifically as security considerations permit;

(B) an opportunity within 30 days thereafter, plus an additional 30 days if the charges are amended, to answer the charges and submit affidavits;

(C) a hearing, at the request of the employee, by an agency authority duly constituted for this purpose;

(D) a review of his case by the head of the agency or his designee, before a decision adverse to the employee is made final; and

(E) a written statement of the decision of the head of the agency.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40306